UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JOHN DOE	:	
Plaintiff	:	
versus	:	Civil Action Number
MARYMOUNT UNIVERSITY, et al	:	1:17-CV-401
Defendants.	:	

September 15, 2017

The above-entitled Motion to Dismiss was continued before the Honorable T.S. Ellis, III, United States District Judge.

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P R O C E E D I N G S

THE DEPUTY CLERK: John Doe vs. Marymount University, et al. Civil Case Number 1:17-CV-401.

MR. DILLON: Good morning, Your Honor. Justin Dillon for plaintiff, John Doe.

THE COURT: All right. And who's here for the defendant?

MR. WATERS: Good morning, Your Honor. Jason Waters for defendant, Jane Roe.

THE COURT: And is that the only defendant that's at issue today?

MR. DILLON: Yes, Your Honor.

MR. WATERS: Yes, Your Honor.

THE COURT: And that's because the plaintiff has alleged a defamation against that person alone, is that correct?

MR. WATERS: That's correct, Your Honor. There's an assault count.

THE COURT: And now the -- that defendant seeks a dismissal under 12(b), because it's barred under the single publication statute of limitations rule. The statute beginning to run in November. And the question is whether there's a single publication issue.

All right. Let me hear first -- and also there's

a -- an immunity issue and a qualified immunity issue.

All right. Let me hear first from the movant. Make it brief, because if you've already said what you're going to tell me in your brief, you're wasting my time and the time of everyone else in here.

MR. WATERS: Of course, Your Honor. May I please the Court. Ms. Roe is moving --

THE COURT: Let me -- Mr. Fitzpatrick, you're here for a plea?

(Discussion off the record.)

THE COURT: All right. Go ahead, sir.

MR. WATERS: Thank you, Your Honor. I believe that the motion papers have quite substantially limited the issues.

THE COURT: Mr. Simms is here.

(Discussion off the record.)

MR. WATERS: Thank you, Your Honor.

The motion papers in this case have quite substantially limited the issues with regard to the statements that are at issue with regard to my client. There were a variety of statements attributed to Ms. Roe in the complaint and I think that in the motion practice we really limited them down to only two statements that were made within one year of filing. These are the statements that are allegedly made in a victim impact statement in June of 2016 and an appellate response in July of 2016. I think -- I understand counsel has

agreed that none of the proceedings statements that were attributed to my client were made within one year of her filing. So the only statements that we're looking at for the defamation per se claim are the ones made in June and July of 2016.

So the first issue is whether, under Your Honor's decision in *Katz v. Odin, Feldman*, whether those statements are timely and adequately pleaded to state a defamation claim.

We also have, as I understand it, agreed that the statements that were made in June and July of 2016 are at least qualified or -- enjoy qualified immunity under Virginia law meaning that they may only proceed against my client if the plaintiff is able to establish malice and allege sufficient facts to show that the evidence would be able to establish malice by a clear and convincing evidence.

So the -- the three issues are: First, whether the June and July statements are timely and adequately pleaded. Second, whether those statements which were made in the context of a Title IX investigation and pursuant to federal statute -- conducted pursuant to federal statute enjoy absolute immunity under Virginia law in the First Amendment. And third, whether the statements -- whether the complaint adequately stated facts that would show malice in order to allow them to go forward if absolute immunity is not available to them in this case. Regarding the statute of limitations

issue, if you look at the --

THE COURT: Tell me again what you -- what you claim are the only two statements at issue?

MR. WATERS: Yes, Your Honor.

In the single count against my client, there are two statements that were made within one year of March 31, 2017. It is a June victim impact statement and a July appellate response. These were submitted as part of the Title IX investigation. Plaintiff counsel does not allege the contents of those statements. The allegations in the complaint are limited to: Upon information and belief Ms. Roe stated that there was a sexual assault.

What's critical about those two statements is that the allegations mirror the same allegations regarding prior, admittedly untimely statements. So in our view the *Katz* case is actually quite controlling here, particularly Your Honor's discussion about defamation and continuing tort. As you may recall in the *Katz* case, one of the arguments that the plaintiff made was that the letter that was submitted to the arbitration panel was subsequently repeated by counsel at the arbitration hearing. And that because those statements were repeated, it constituted a continuing tort and Your Honor recognized that's not the case. Both in the *Katz* case and then in the *Lewis v. Gupta* case.

It is clear to us and we believe, based on the --

also the motion practice as well as the pleadings, that while it's not characterized as trying to fit this in as a continuing tort, that's precisely what the plaintiff is trying to do here. Because the plaintiff doesn't know what the contents of the statements were made in June and July of 2016. The allegations are made purely upon information and belief. And there's no other information about those statements included in the complaint. And if Your Honor looks at the complaint in the context of those two statements disregarding all of the information in the allegation with regard to statements that are attributed to, are long before the admittedly untimely statements, there's simply not enough to qualify under either Rule 8's pleading standards or the Virginia requirement that the def -- and defamatory words be pleaded in haec verba or the precise words.

THE COURT: You understand that Virginia pleading rules don't apply here. It's the federal rules of civil procedure.

MR. WATERS: Of course, Your Honor. Yes, and in that regard, I note that we cited two cases in our brief that both -- both Eastern District of Virginia cases, I believe within the last five years, the *McGuire* and the *Golumamine* case, I believe, that indicated that the Eastern District will look to the Virginia pleading standards with regards to the sufficiency of an allegation on a defamation claim.

Now I have to admit in candor, after we filed our reply brief in this case we did learn of a decision from the Western District of Virginia. This came out August 3, 2017. This is the *Cameron Jackson v. Liberty University* case, where the Western District in an unreported decision, citing an unreported Fourth Circuit decision, indicated that essentially that the pleading requirements under Rule 8 did not require the precise words, but we seem to have this conflict between the Eastern District cases, the *McGuire* case and the *Golumamine* case that we cited, which is that the Eastern District courts will look to that statute.

THE COURT: Well, it doesn't say that they're going to be governed by that.

MR. WATERS: No, but it is something that the courts are looking at and considering.

THE COURT: I think that's pretty clear that Rule -- that the federal rules apply, not state pleading rules.

MR. WATERS: Well, I'm not asking the Court to apply --

THE COURT: I'm not an author of any of those, am I?

MR. WATERS: No, Your Honor.

THE COURT: I wouldn't have done that.

MR. WATERS: I'm not asking the Court to apply state pleading rules, but I am asking the Court to consider, when we're looking at the Virginia tort of defamation, this is a

state law tort claim. We're looking at the sufficiency of these particular pleadings, the only thing that is said about the statements in June and July of 2016 is that she said there was a sexual assault. And only upon information and belief, which even under -- under cases interpreting Rule 8, the qualifier upon information and belief must be viewed with great suspicion, because it indicates that the allegations are tenuous at best. But what we're looking at is the plaintiff doesn't know what was actually said in those two statements. But the plaintiff does have a good idea and it does know what was stated much earlier in untimely statements.

So when you compare this with the *Katz v. Odin, Feldman* case, it's pretty clear what we're really trying to do is kind of argue that this is essentially a continuing tort. Arguing that these June and July statements in the exact same context, okay, the Title IX investigation, essentially continue the tort or relate it back to its original statements and it's simply both from the Court's decision I believe in *Katz* as well as applicable decisions interpreting Rule 8 indicates that this is not sufficiently pleaded to state a defamation claim for those two statements. As well as to show that those two statements frankly are untimely, because the claim with regard to those two statements is untimely because essentially we're trying to relate them back to the prior comments.

Should the Court disagree that the claims with regard to those two statements are either untimely or that those claims are sufficiently pleaded, we respectfully submit to the Court that these statements were made in the context that enjoys absolute immunity under Virginia law and under the First Amendment.

And again, continuing a trend from the preceding case we ask your Court to -- Your Honor to review the Court's decision in *Katz v. Odin, Feldman*.

The -- these Title IX proceedings from the student's perspective are unquestionably quasi judicial matters. There's no question that a student who is before the university with a grievance of sexual assault is putting themselves in a position where the university, pursuant to a federal statute, must investigate and adjudicate the events that transpired and form the basis of the complaint.

There's no question from their perspective that the university will be making a decision as to essentially their rights as students of that campus and that this university must do so pursuant to federal law. In fact, the plaintiff's complaint itself is replete with language that shows the quasi judicial nature of this.

There will be an investigation. There will be an adjudication. There's a standard of determination, which is preponderance of the evidence. There is notice. There are

opportunities for appeal. There's an equal opportunity under the policies to be heard. The university's investigators prepare a report. The students have the opportunity to comment on their report. They have an opportunity to submit evidence and identify witnesses.

THE COURT: All of that state involvement is sufficient to convert what the defendant Marymount does to state action sufficient to trigger the 14th Amendment?

MR. WATERS: I'm sorry, Your Honor. I don't understand your question.

THE COURT: You're emphasizing the state involvement. I'm asking whether that state involvement is sufficient to trigger the application to Marymount of the 14th Amendment in the procedures they use to investigative these matters.

MR. WATERS: Your Honor, I apologize if I've misspoken. I'm not intending to emphasize state involvement. What my intention is is to show the characteristics of this proceeding under Marymount's procedures pursuant to federal law demonstrates that it has the nature --

THE COURT: All right. Pursuant to federal law, does that -- does that mean that the 14th Amendment is triggered so that Mr. Doe here would have 14th Amendment right to due to process in the way he's treated by Marymount?

MR. WATERS: Well, I don't represent Marymount and

I -- and I'm not making any representations with regard to the application of the 14th Amendment.

THE COURT: Refresh my recollection, which defendant do you represent?

MR. WATERS: Jane Roe, the student. My client complained of being sexually assaulted to the university which conducted the investigation.

THE COURT: All right.

MR. WATERS: The applicable inquiry under Virginia law with regard to absolute immunity is the quasi judicial nature or the characteristics of the proceeding that -- whether they resemble a judicial proceeding. What I'm arguing, Your Honor is that the characteristics of this proceeding, according to the plaintiff's own pleadings and the policy that existed for these students, resembled very much a quasi judicial proceeding such that the statements the student makes in the context of this proceeding should be absolutely immune, because to do otherwise would chill speech on such a critical issue, a sexual assault on campus.

If anything else, the absolute immunity encourages the frank and robust litigation of these issues within the context of the Title IX investigations.

THE COURT: Well, they are litigated. You know they're not bound by due process or anything else?

MR. WATERS: But --

THE COURT: There isn't any robust litigation of these things by Marymount. Give me a break.

MR. WATERS: Well, their procedures include the elements that I've outlined. And as far as the students are concerned, they're bound by the university's procedures. They must proceed under the university's rules. This isn't a situation where the student, such as a university may, for example, seek absolute immunity for its own statements with -- and to -- to essentially cover its own perhaps deficiencies on it -- with regard to due process. The students don't have a choice here.

THE COURT: I'm merely cautioning you about talking about robust litigation. It isn't that.

MR. WATERS: My point, Your Honor, and I -- and I -- and I understand. But my point was, by affording absolute immunity to these statements it allows the students who are the victims of sexual assault or being accused of sexual assault, falsely or correctly, of having the protection to speak candidly and frankly with their universities when these investigations are underway. And that is simply my point.

And I would argue that this is quite analogous to the *Katz* situation which the fee arbitration proceeding in that matter was also done pursuant to the statute. It was done pursuant to the Virginia fee arbitration statute.

So, there are a variety of characteristics that make

this proceeding resemble a judicial proceeding and particularly from the perspective of the students. Should absolute immunity not apply to the statements? I believe counsel and I agree that the statements that we're looking at, only the June and July 2016 statements enjoy at least qualified immunity requiring sufficient allegations to show that the plaintiff be able to prove by clear and convincing evidence that the statements were made maliciously. And this is particularly significant when you look at the pleadings in this case as well as the plaintiff's response.

All of the allegations -- first of all, the allegations of the complaint simply state they were made maliciously. There is no factual predicate given in the actual account with regard to the basis for the malice claim.

When you look at the other allegations throughout the complaint with regard to conduct as well as the ones that are cited to in opposition to our motion, counsel is looking at things that happened the night of the event, November 8th of 2014, and asking the Court to say that those events suggest that the statements nearly two years later were made maliciously. There's absolutely nothing in the complaint or the count itself or the opposition to our motion that suggest the context of those statements made in June and July of 2016. In fact, the complaint shows that my client was asked to give these statements by the university as it was proceeding in

this investigation. There's no indication that she was acting out of a sense of revenge, there's no indication that she was acting out of feelings of rejection. It was with regard to this. But the only statements that are or the only acts and conduct that were pointed to, to show, well this could have been done maliciously are 8 to 18 months prior to the statements that are the only issues in the case.

And again, the recent decision regarding Liberty University is actually illustrative in that respect because that Court allowed the claim to go forward on qualified privilege with regard to the malice question. And in that case the student -- the complaining student, the victim student, were saying things like expletive Liberty University made statements indicating an intent to gain retribution against the football team, which was involved in the claim. And made particularly pointed statements about suggested that the assault never actually happened.

So when you look at these particular statements, in the context of Title IX, given at the request of the Title IX adjudicator and without any context that suggest that in June or July of 2016 she's acting in any form of malice. We respectfully submit for the reasons that we've cited on all three of those reasons in the issues in this case, the complaint should be dismissed with prejudice without leave to amend.

THE COURT: All right.

MR. DILLON: Thank you, Your Honor. May it please the Court. I agree completely with Mr. Waters' framing of the issues. I think we're on all fours there.

THE COURT: So it's two statements that we're focusing on?

MR. DILLON: That's correct, Your Honor.

So I want to start and just provide a little bit of context and I'll go to the three issues. This is not the typical kind of sexual assault case. Mr. Doe isn't someone who lost a swearing contest, is upset about that, and is now basically going after the complainant just because he believes they should have believed him. It's a lot more than that. I can highlight three particular pieces of evidence that show or strongly suggest that this is a false and defamatory allegation.

Number one, the text messages. That night about roughly an hour-and-a-half after what the complainant later alleged would be an incredibly violent sexual assault in which the -- Mr. Doe literally chased her as she ran away. He texted her saying, "Hey, y'all ain't going out tonight?" And she responded, "I'm eating pizza, ha ha." So you got sort of a fun light-hearted text exchange between them just hour-and-a-half after, not some sort of, you know, drunken hookup that both of them sobered up from but a violent, very

violent sexual assault.

But number two, you have her own female roommate L.J. who said that when Ms. Roe came back from her dorm she was, quote, happy; quote, giddy; said that Mr. Doe was quote, good with his tongue and showed off the hickeys that he gave her.

THE COURT: The what?

MR. DILLON: Showed off the hickeys that he gave her. And that she started to, only when she continued to drink and was ignored by the people who didn't want to hear about this interaction, did she start to take -- her conversations started to take a darker turn, when she wasn't getting the attention that she wanted.

And then finally, the third factor, is just the sheer physical impossibility of what she alleges. I mean there's a lot of it. But I think the -- the risk of being graphic, Your Honor, it's her allegations that while she was standing up Mr. Doe took his entire fist and forced it inside of her vagina. You think anyone with a passing knowledge of human biology will understand that is impossible, but that is what she said. Not punched, put the whole thing inside.

So, I think that is important background. This isn't just they should have believed me. It's, I have contemporaneous evidence about what actually happened that night in the falsity of her statements.

So with that as background, I'll go through the same factors that Mr. Waters went through in the same order. First with respect to the statute of limitations, Mr. Waters makes much of the fact that we don't know what was said in June and July of 2016. And as we made quite clear in our pleading, Your Honor, that's because Marymount won't tell us, which is actually a violation of federal law. Under FERPA, the Federal [sic] Educational Records and Privacy Act, they're supposed to give him a copy of his educational record which would include everything here. He asked for it after this whole thing was over in September of last year. They refused to give it to him. When he asked for a redacted version, he was told by defendant McMurdock that there's no way that we can redact it enough so that you can't figure out who was saying what. Even when, of course, he knows who everybody is. And what we were asking for included the victim impact statement of the complainant and he knows who she is, and her response to his appeal, and again he knows who she is.

So it would be -- I don't know what the word is -- more than absurd to hold Mr. Doe responsible for not knowing the content of secret ex parte statements that he asked to look at and was not allowed to look at. So -- and I think that's point one.

Point two is, the idea that you can't -- Mr. Waters wants to make this a temporal distinction about, Well, we

don't know what she said in those statements and how that relates back. We're not alleging any sort of continuing tort. This isn't a Katz case, it's a *Lewis v. Gupta* case. Right? I mean this is a day where I think we're just quoting Your Honor over and over again. But Your Honor's opinion in *Lewis v. Gupta*, and this is on all fours on that. Here, just like in *Lewis v. Gupta*, you have an initial report -- allegedly false report of sexual assault. Here, just like in *Lewis v. Gupta*, that initial report is time barred.

Here, just like in *Lewis v. Gupta*, you have two later additional statements to the law enforcement authorities in *Lewis v. Gupta* and here in the Title IX process. And in *Lewis v. Gupta* Your Honor held that although the first report was indeed time barred, it is sort of Hornbook law, and it's even so basic it's in every statement, that when you repeat a defamatory statement, it is a new tort each time. That is what you held.

This isn't a Katz case. And I understand what they want to do with the *Katz* case. But in *Katz* it's different. In *Katz* there was a defamatory letter that was sent to an arbitration hearing and then talked about. But there was only one -- and they were just litigating the content of the defamatory statement. So this is -- and this -- so this is not at all a *Katz* case. It is on all fours with *Lewis v. Gupta*. And that makes sense. I mean again it's in the

restatement. It is just Hornbook law that if you say it later, according to law enforcement, that it's a new tort.

So that's all I have to say on the limitations issue unless the Court has any questions on that.

With respect to absolute privilege or qualified privilege, Mr. Waters does his level best to talk about -- to sort of make this process at Marymount sound quasi judicial. I would say it is as similar to a judicial proceeding as a raccoon is to a horse. And that they both have four legs, but things tend to diverge after that. Okay. Here is what you don't get at Marymount: You don't get cross-examination, you aren't allowed to subpoena witnesses, you aren't even allowed to speak to witnesses, anybody in the case at all. Not just the complainant. You literally can't interview witnesses. You're not allowed to see the actual evidence against you. You just get the investigators' statements, summarizing witness testimony. There is, of course, no threat of perjury. Attorneys can serve as advisors in these processes, but they are not even allowed to talk. And I can tell you from personal experience are reprimanded when they try to.

And finally, and this is -- and I think it's hard to pick -- the most -- the craziest part of the policy, but you aren't even allowed to meet with the person making the decision. The investigators make this investigative report, they give it to you and then they hold back the juicy bit that

has the determination about whether he did it or not. You don't get to see that. That then goes to the adjudicator who you never get to meet with. We tried. We asked for it. They said no.

THE COURT: I take it you were counsel in the Doe case that I had previously?

MR. DILLON: I was, Your Honor.

THE COURT: I take it you've considered carefully whether this case could fit under the 14th Amendment?

MR. DILLON: You know, Your Honor, Jed Rubenfeld has a very interesting article out --

THE COURT: Who has?

MR. DILLON: A Yale law professor has an interesting article that came out earlier this year raising exactly this claim that basically -- or argument that essentially has the education department so commandeered the Title IX process that it converts private actors into state actors. I think it is a fascinating intellectual argument that I may make one day but it's aggressive and so I'm trying to be modest.

THE COURT: When was the article published?

MR. DILLON: Earlier this year. I don't remember exactly but it was Jed Rubenfeld. I think it was in the Yale Law Journal, but it was, I think 2017, maybe late 2016, but within the last 12 months. So it is an interesting argument that I may make one day, but I'm not making today.

THE COURT: Well, your cocounsel was on his way to making it.

MR. DILLON: If he wants to, and I think quite rightly, he's not here representing Marymount.

So when you don't even get to meet with the person making the decision, it's kind of hard to call that quasi judicial. And that's, you know, the *Elder v. Holland* case. Right? And Virginia Supreme Court said that the -- the process for police discipline was not quasi judicial such that you got absolute immunity as the privilege because there was no subpoena power, you can't compel witnesses, no perjury penalty, no rules of evidence. The same thing in *Cleavinger*, no compulsion or cross-examination, no discovery, no verbatim transcript, no rules of evidence.

And also, Your Honor, qualified privilege makes sense here. Right? I mean it just does. You only have a qualified privilege, you only -- excuse me -- you only have qualified privilege if you lie to the police. And when you -- and in the police process, of course, you get all the constitutional protections. If that only gets qualified privilege, why would statements made, and in context, where you have far fewer rights get more privilege. Plus imagine what the incentives you would create, right; what would absolute privilege mean if you did that? You would have complete immunity from false statements in the investigation

process. So you got a bad break. Well, there's a way around that. Go to the Title IX office and say your professor sexually harassed. And he can't do anything about it as long as you only stay at the Title IX office.

You're mad at your roommate, you don't like him, he smells bad, he smokes. Say you saw him cheating and there would be literally no remedy for that. That is crazy. And that's not the law.

So that takes us to malice, Your Honor. I think we are firmly in and we've admitted that we're in the qualified privilege land. And I think the question here is, Does falsely accusing someone of sexual assault constitute malice? I think that to sort of ask that question, Your Honor, is to answer it. And again, I want to distinguish what kind of case this isn't. This isn't a case where you don't have any other evidence like we have with the text messages or the roommate where you can maybe believe that someone, a complainant managed to convince herself, for whatever reason, that something she didn't like was nonconsensual. That's not this. This wasn't a drinking case or anything like that. This was an alleged violent sexual assault which she went right back to her dorm room and praised the alleged perpetrator as being good with his tongue and all those things.

So malice, of course, doesn't include just actual malice. It includes statements that were made with such

indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff.

What's the motive here? Mr. Waters seeks, I think, gainly, to say you can't look back at the original statements, to seek motive about for what she later said in July -- June and July of 2016. I don't really see the -- I don't see the logic of that to be honest. Of course you can. You know it's -- she's falsely reporting the same sort of operative facts. And here, her own roommate said that she -- she wasn't getting the attention that she wants and she, you know, made it up for this reason. I think sort of implies that she may have made it up for this reason. And that she does have a tendency, according to her own female roommate, sort of cast herself as a victim. Again, we allege these things in our complaint.

This is similar, Your Honor. It may sound crazy to say, Why would someone do this? Why would you allege this violent sexual assault just because you want attention? I don't know. Let's think of the *Jackie* case, the UVA case, where, as I think the Washington Post has now made clear to everybody in -- and I think so have the court system, what did you have there, Jackie fabricated a sexual assault by a bunch of guys in a fraternity in order to get another guy to like her and sympathize with her. She may have had nothing against the fraternity guys. I think they were just maybe a means to

an end, which was to get the other guy to like her. But, of course, I don't think anybody could look at that and say that is such a statement of an alleged gang rape was not made with actual malice. And I think again that's here. You don't -- we don't have to at this stage of the process, Your Honor, the motion to dismiss stage, to plum her mind to know exactly what happened. But I think we can infer based on everything -- based on the very fact of a false allegation of sexual assault and what that does and the fact that she again pursues it all the way through June and July of last year that it was made with, at a minimum, wanton or willful disregard, gross indifference of recklessness as to amount to a wanton and willful disregard of the rights of the plaintiff.

Again, this case might be different if it were two people who got drunk at a bar, went home, slept together and the complainant wakes up the next day and says "I was too drunk to consent." That might not be wanton and willful. This is not that case. This is a case with more contemporaneous evidence. There is no real significant alcohol consumption involved and it's an allegedly violent rape, that they're texting about in a cutesy way just an hour-and-a-half later.

And that's all I have.

THE COURT: All right.

MR. DILLON: Thank you, Your Honor.

THE COURT: Yes. Do you have anything you want to add?

MR. WATERS: Very briefly, Your Honor.

Counsel mentions the text messages, but he omits the fact that a few weeks after the fact there was a text exchange where my client told Mr. Doe that she felt that he was aggressive with her and he apologized.

So I think that the arguments with respect to the truth and falsity of this have to be viewed in the context of the fact that, one, we have an apology and --

THE COURT: I don't have to make a determination about truth and falsity in this stage, do I?

MR. WATERS: Well, neither does "eating pizza, ha ha" have -- bear on the truth or falsity of it any less, I believe, Your Honor.

With respect to the absolute immunity argument, to be clear I'm not making a 14th Amendment argument, I'm making an argument under the Virginia Supreme Court standards with regard to when absolute immunity applies. And what we're looking at are the characteristics of the proceeding and the ability to subpoena witnesses or to engage in confrontation to confront the witness is not the sine qua non of absolute immunity under Virginia law. They may be considerations but they are not the absolute determinative factors. And when you look at the plaintiff's complaint in its entirety, I believe

that there's more than sufficient allegations to show that these procedures were quasi judicial.

THE COURT: Tell me what these two -- the dates of these two statements again?

MR. WATERS: June 2016 and July 2016.

THE COURT: Both of those are within the statute of limitations?

MR. WATERS: They were, Your Honor.

THE COURT: So the single publication rule, all of that is sort of swept away?

MR. WATERS: Well, our argument, Your Honor, is this is much like the *Katz* situation where there was an oral representation of the statements that were made in the original letter and that when you look at these statements, as they are pleaded, it is essentially an attempt to call it a republication but it really is an attempt to boot strap off the earlier statements in a continuing tort type of way.

And then with regard to qualified immunity, there is zero context alleged in the complaint with respect to when the June and July statements were made except for the allegations that show that these statements were made at the request of the Title IX adjudicator. Under those circumstances we submit, Your Honor, that there is no -- not sufficient to meet the malice standard to allow the plaintiff to proceed.

THE COURT: The matter is before the Court on a

motion to dismiss at threshold level.

MR. DILLON: Thank you, Your Honor.

THE COURT: I am puzzled -- yes, did you --

MR. DILLON: No, I said thank you. Sorry.

THE COURT: -- raises some interesting questions. But we need to get about litigating this case and I've got to resolve it one way or the other. I am going to write briefly on these issues. Very briefly. I think there's -- that the statements are not barred by the statute of limitations. And I don't think qualified or absolute immunity apply, but I'll write about that to give you a bit more context.

It's sad to me that these things progress the way they have. But then these are young people and for some reason -- I mean, I think, today these are much better times than 50 years ago. Much better. Lots of things are better in our society than they were 50 years ago. It's by far better. Especially if you're a woman or an African-American, much better today.

When I first came to this country, there were separate drinking fountains, separate places for people to sit depending on the color of their skin. Thank goodness we don't have that anymore.

But what we don't have anymore and what we did have back then is young people had personal responsibility. And these are young people at these universities. I went to a

university when I was much younger and saw other universities. Now, there were probably a lot things that happened at universities that I never knew about. But I can tell that you when I was at a student of university I never heard of drugs, never saw any drugs, never heard of any drugs. The big thing was 3.2 beer. Sexual assault was unheard of. It's just a different world in that respect and I'm sorry about that, because this is the trouble young people get into.

But this -- the motion to dismiss is denied for reasons that I'm going to state more fully. But these are young people who need to get on with their lives and need to begin to accept the responsibility of being adults. I doubt that Jane Roe or Doe are juveniles anymore. They are both adults now, aren't they?

MR. WATERS: Yes, Your Honor.

THE COURT: Well, they've got to begin living like adults, supporting themselves, getting a job, doing responsible things, not violating the law. And one of the ways they can do it, is to settle this case. Get it out of the way. Get it done, get it behind them, lessons learned. Don't do this again, don't do that again, and why they shouldn't do it. But I am going to write briefly about this.

Now what stage is this matter in? And what, if anything, can I do to aid the parties, including parties not here, to see if they can resolve this matter? Your client, I

take it, is no longer a student at Marymount?

MR. DILLON: Correct, Your Honor. He's suspended for two years.

THE COURT: All right. And have you had any discussions with the other defendants about how to resolve this thing?

MR. DILLON: Yes, Your Honor. And at this time and we've had -- I will say this, I'm sure Your Honor remembers I had a good working relationship with defense counsel in the George Mason case. We weren't at each other's throats. And I think Mr. Waters and I have friendly conversations as do the attorney for Marymount as well.

At this time, you know, we've had -- we've talked, I think, in general about settlement.

THE COURT: Did that case ultimately get settled?

MR. DILLON: No, Your Honor, we won on summary judgment.

THE COURT: All right.

MR. DILLON: We were in Judge Nachmanoff's chambers until 1:30 in the morning for mediation that we thought was going to settle, but then it didn't settle.

THE COURT: But I decided it.

MR. DILLON: You decided it, Your Honor. So we're open to it.

THE COURT: Don't worry. That was a 14th Amendment

case.

MR. DILLON: And I --

THE COURT: You should be -- your co-defendant should be glad this isn't a 14th Amendment case.

MR. DILLON: I'm now thinking I should amend a second time. To be honest, Your Honor, I think we are all realists here, I think that when the -- if -- if we get past the motion -- if the plaintiff makes it past the motion to dismiss stage in a civil case, I think that sometimes changes the --

THE COURT: Well, I'm going to issue a very, very brief opinion in this and it will move on, but the -- no plaintiff is going to get rich in these things. And no defendant is going to go to bankruptcy court. But you all need to find a sensible resolution of this that puts matters back in proportion to some extent.

MR. DILLON: I agree with that, Your Honor.

THE COURT: I beg your pardon?

MR. DILLON: I agree with that. He just fundamentally, Your Honor, he just wants his reputation back.

And you asked me a procedural question that I did not finish answering. May I finish answering?

THE COURT: Yes.

MR. DILLON: I got off track. Where we are with the Marymount -- do you want me to update you on where we are with

the Marymount, the case against Marymount? It's a little bit complicated, so.

THE COURT: Well, I might but let's go on.

What, if anything, can the Court do to assist counsel in perhaps reaching an amicable resolution of this?

MR. WATERS: May I ask for one clarification, Your Honor? Your Honor, I'm sorry.

The Court indicated you plan to deny our motion to dismiss. I just want to clarify --

THE COURT: I'm going to issue an order today denying it saying a memorandum opinion will follow.

MR. WATERS: Okay. I wanted to be clear because we do have an agreement that our motion, I understand, should be granted to the extent it relates to statements other than those two as well as to the agreement.

THE COURT: All right. This order I enter will reflect that agreement.

MR. WATERS: Okay. Thank you. I'm sorry.

THE COURT: Go on. What can I do?

MR. DILLON: I think put the three parties in a room. But I think --

THE COURT: I don't get involved in settlement as you know. I don't want my judgment infected by the parties' positions. I don't like the settlement process. And I'm, more importantly, not very good at it. Because I generally

end up thinking people's positions are silly.

MR. DILLON: Where we are now with Marymount is we, I think, argued the motion to dismiss against Marymount, I want to say forgive me, Your Honor, some time -- it was actually at the end of May.

THE COURT: And I ruled on that?

MR. DILLON: No, Your Honor, you haven't ruled on that. And then it may be because we have filed a motion to amend the complaint. And that is now fully briefed. We filed a motion to amend to add essentially a third incident at Marymount the way it treated a third male student to add to our Title IX claim. So that is now fully briefed. We filed our reply brief in that on Wednesday.

THE COURT: All right. I will decide that reasonably promptly. That's enough. And then I'll tell the parties to contact -- who's the magistrate judge?

MR. DILLON: Judge Nachmanoff, Your Honor.

THE COURT: I'll instruct you all to contact his chambers. Thank you.

MR. DILLON: Thank you, Your Honor.

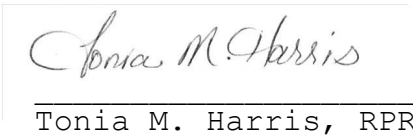
(Proceedings adjourned at 12:28 p.m.)

CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motion to Dismiss in the case of the **JOHN DOE versus MARYMOUNT UNIVERSITY, et al**, Civil Action Number 1:17-CV-401, in said court on the 15th day of September, 2017.

I further certify that the foregoing 34 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this the 24th day of October, 2017.



Tonia M. Harris, RPR
Official Court Reporter